No. 7681

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TOICHI TOMIKAWA,
Claimant and Appellant,

vs.

AMERICAN OIL SCREW "PATRICIA," No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

UNITED STATES OF AMERICA,
Libelant and Appellee.

Petition for Rehearing

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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To the Honorable Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the libelant and appellee herein, the United States of America, and respectfully requests this Honorable Court to grant a petition for rehearing in the above entitled appeal and bases its petition for said rehearing upon the following grounds:

Grounds For Rehearing

The basis for the request for rehearing in this matter is founded upon the opinion of this Honorable Court,

filed February 10, 1936, and the reasons stated in said opinion for the reversal of the decree entered below. Said grounds are summarized as follows:

I. Any defect in the form of the libel was waived in the court below by failure of the respondent to except thereto and the defect which was stated in this Court's opinion did not prejudice the rights of respondent.

II. The demand for the production of the manifest, although actually made by a seaman of the Coast Guard, was made at the direction of and in the presence of an officer of the Coast Guard.

III. The failure to produce a manifest incurs the penalty of the value of the cargo on board to the same extent as producing an incorrect manifest.

IV. The vessel involved was engaged in the cargo carrying trade and, being an American domiciled vessel, was not entitled to do so because it was neither licensed nor documented, but only a "numbered" vessel.

I.

Any Defect in the Form of the Libel Was Waived in the Court Below by Failure of the Respondent to Except Thereto and the Defect Which Was Stated in This Court's Opinion Did Not Prejudice the Rights of Respondent.

This case was tried and presented in the court below, and in this Court, on the theory that the vessel was bound to the United States, and no exception to the sufficiency of the allegations of the libel as amended was made either in the court below or here.

In none of the one hundred assignments of error asserted by the appellant was any such objection raised, which indicates that the appellant recognized he had waived any claim he might have that the libel did not state a cause of action because it failed to allege, in so many words, "that the vessel was bound to the United States." Going through this Record, as appellant did, in search of error, he would certainly have asserted such a defect if he felt he was entitled to take advantage of it.

The libel in the instant case alleged, we respectfully submit, in general terms all the essential averments to lay a ground for forfeiture. Pertinent allegations are those set forth in paragraphs III and IV of count two of the amended libel (R. 27), and particularly the second paragraph of paragraph III, which stated:

> "That the said Master, T. Tomikawa, failed and refused to produce said manifest in response to the demand of the said officer in violation of Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584."

We respectfully contend that it is necessarily implied from said allegations that the vessel was bound to the United States or there could have been no violation of Section 584 of the Tariff Act of 1930 as claimed. Certainly the claimant was not prejudiced or misled by lack of a more specific statement. He introduced evidence on the point of the vessel's being bound to the United States and by his own evidence proved that it was. This is clearly shown by the following excerpts from the Record.

The claimant himself, in answer to his proctor's question, stated (R. 267):

> "* * * then I started back from San Diego to come to San Pedro again."

And in answer to the Court's question on the same matter, the claimant said (R. 268):

> "Q. Where did you take the boat?
> "A. From the point where the engine stopped, we tried to come back to San Pedro."

Furthermore, the proctor for the claimant not only did not object to these proceedings on the ground that it was neither alleged nor proved that the vessel was bound to the United States, but he expressly admitted that fact in his brief filed in this Court. In respondent's typewritten "Reply Memorandum for Claimant and Appellant," in the last line on page 2, he states:

> "* * * and on the way back to San Pedro, the vessel was seized (See R. pp. 268-273.)"

In support of our argument on this point we respectfully refer to the following decisions of the Supreme Court of the United States.

In the case of *Friedenstein v. United States,* 125 U. S. 224, 31 L. Ed. 736, the Court held:

> "* * * any defect in the information which could have been availed of by demurrer, or by exception, or by a motion to dismiss at the trial, made on the ground of such defect, or by a motion in arrest of judgment, must be regarded as having been waived, or as having been cured by the verdict."

In the case of *The Quickstep,* 9 Wall, 665, 19 L. Ed. 767, the Supreme Court said:

> "It is objected that the libel is too general in its terms, and is defective because it does not state the particular acts of negligence and misconduct on the part of the tug which produced the injury; but if this were necessary, the objection should have been interposed at an earlier stage of the proceedings, and cannot be taken, for the first time, after the cause has reached this court. It is always better to describe the particular circumstances attending the transaction; but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the court can see there was no design on his part in omitting to state them."

To the same effect see *San Juan Light Co. v. Requena,* 224 U. S. 89, 56 L. Ed. 680.

The injury to the libelant in the decision of this Court reversing the decree of forfeiture of the court below in

so far as said reversal is based upon the failure of the libel to allege "that the vessel was bound for the United States" is far greater than would have been the result had exception been taken to the libel for that reason in the court below, for certainly the libelant would have been permitted to amend the libel had such exception been taken, under the generally recognized liberality of pleading in admiralty cases. Had such an objection been raised after trial in the court below, the same liberal rule of amendment of pleadings would undoubtedly have been granted libelant, primarily because such amendment would be merely to conform to the proof as found by the court below in finding of fact number I. (R. 311.) The vessel in question was "traveling toward the coast of the United States."

For the reasons given, we respectfully submit that the libel herein should not be dismissed on the ground stated. However, if this Court feels that the libel was deficient in failing to assert, in so many words, "that the vessel was bound for the United States," a rehearing should be granted herein and the libelant permitted to amend its libel so as to include said allegation.

II.

The Demand For the Production of the Manifest, Although Actually Made by a Seaman of the Coast Guard, Was Made at the Direction of and in the Presence of an Officer of the Coast Guard.

The demand for a manifest was made by a seaman at the direction of an officer of the Coast Guard as shown by the evidence in these proceedings. Under the general

principles of agency such a demand by the seaman acting under orders of his commanding officer and in the presence of such officer may properly be considered a demand of the officer. We respectfully submit that the term "officer" as used in Section 584 of the Tariff Act of 1930 should be liberally construed to effect the purpose intended by such Statute. In this case, according to the testimony (R. 75-76), the officer in command of the Coast Guard cutter, Frederick J. Dwight, testified in effect that he hailed the vessel but it did not stop; that he motioned to the two men in the pilot house and asked them why they did not stop; that he asked one of the men what his cargo was and he was told the vessel had a cargo of abalones; that he placed a seaman on board the Patricia who reported to him that they had no papers and that the captain was left at Turtle Bay; and that, not satisfied with this information, he went on board himself and lifted up the main hatch and found the vessel loaded with sacked liquor. Now we submit that under such circumstances the sending of the seaman on board in the presence of the commanding officer to demand an inspection of the papers of the vessel, particularly where it is evident that the demand comes from a Coast Guard officer, is sufficient compliance with said Section 584. It surely was evident that the officer was demanding the papers, and the pertinent portion of Section 584 is as follows:

> "* * * who does not produce the manifest to the officer demanding the same."

Furthermore, there is not any showing in this case that the operators of the libeled vessel questioned the

right of the seaman to make a demand for the papers or insisted that the demand should be made by the Coast Guard "officer."

As just stated, the commanding officer of the Coast Guard cutter sent seaman first class Blondin on board the Patricia when the Coast Guard cutter came along side. He went in and asked for the Master of the boat and was told the Master of the boat was left in Turtle Bay. He then stated, "I asked for a manifest and registration papers, and he said he didn't have any." One of the men on board the Patricia at the time, Mr. Hirata, testifying as a witness for the claimant, admitted that when the Coast Guardsman came on the boat he was asked for his papers and said, "I told him I didn't have any." There can be no question then but that a demand was made for the manifest, but no manifest was produced because the vessel did not have any. Now as to the demand being that of an officer within the meaning of Section 584, it is hard to understand how it can be ruled that the demand in this case was otherwise. The officer in charge of the Coast Guard Cutter sent the seaman on board the vessel Patricia. This is not an unusual occurrence, but is of such frequent occurrence that the Coast Guard officers and seamen usually function in the manner they did in this case. There might be some reason for holding that the demand of the seaman for a manifest was unwarranted if the seaman on his own initiative, without any orders from his commanding officer and away from the presence of such officer, demanded the production of a manifest from the captain of a vessel. The captain would have the right to question his author-

ity. But here we have a Coast Guard cutter stop a vessel at sea, draw along side the vessel, place a seaman on board for inspection of the vessel and its cargo as authorized by the customs laws (Section 581 of the Tariff Act of 1930, Title 19, U. S. C., Sec. 1581). Furthermore, an "officer" authorized to make searches and seizures under the customs laws is likewise authorized "to demand of any person within the distance of three miles to assist him in making any arrests, search, or seizure authorized" by the customs laws. (R. S. 3771, Title 19, U. S. C., Sec. 507.)

We respectfully submit, therefore, that under the circumstances as shown by the evidence in this case the demand for a manifest was a demand of an officer within the meaning of Section 584 of the Tariff Act of 1930. Incidentally may we say that in any event it is apparent from the evidence in this case that there was no manifest on board the vessel. The testimony of the officer in charge of the cutter (R. 75) was that he placed the seaman Blondin on board in the first instance and "Blondin reports to me that they have no papers and that the *Capitan* was left at Turtle Bay." A new or second demand under these circumstances by the officer in charge of the Coast Guard cutter for the production of the manifest would have been an idle act, which is emphasized by the fact, as is also testified by said Coast Guard officer (R. 75-76), that he was told by those on board the Patricia in answer to his question that they had a cargo of abalones and when he went on board himself and looked in the main hatch he found that it was loaded with sacked liquor.

It is certain from the evidence in this case that no manifest of the cargo was produced and it has not been contended by the claimant that the cargo was manifested. Under these circumstances the penalty for failure to produce a manifest is incurred.

The Maskinonge, 63 F. (2d) 311 (C. C. A. 1st);
The Throndyke, 53 F. (2d) 239 (D. C. N. J.), 67 F. (2d) 198 (C. C. A. 3rd), *certiorari* denied, 291 U S. 659.

III.

The Failure to Produce a Manifest Incurs the Penalty of the Value of the Cargo on Board to the Same Extent as Producing an Incorrect Manifest.

This Court in its opinion apparently concludes that because there was no manifest produced the penalty of the value of the manifest found on board could not be asserted against this vessel because no manifest was found on the vessel in disagreement with the merchandise included or described in the manifest. We respectfully point out that the Circuit Court of Appeals for the Fourth Circuit in the case of *Gillam v. United States*, 27 F. (2d) 296, held that where a liquor laden vessel produced no manifest rather than a false one the penalty for the value of the cargo was not precluded nor was an imposition of the $500.00 penalty only required. *Certiorari* was denied as to this case by the United States Supreme Court in 278 U. S. 635, 73 L. Ed. 552.

May we respectfully point out that to rule otherwise would put a premium upon failure to have a manifest at all because under such a ruling the only penalty that

could be prescribed would be a $500.00 penalty and the penalty for the value of the cargo could be avoided. We submit that such is not the intention of Section 584 of the Tariff Act of 1930.

IV.

The Vessel involved Was Engaged in the Cargo Carrying Trade and, Being an American Domiciled Vessel, Was Not Entitled to do so Because it Was Neither Licensed Nor Documented, But Only a "Numbered" Vessel.

There can be no question from the evidence in this case that the vessel Patricia engaged in the cargo carrying trade. The allegation of the libel in this regard is that the vessel engaged in a trade in violation of Section 4189 R. S. It was established in the evidence that the vessel was a numbered vessel and likewise that she was engaged in trade. The numbering of a vessel under the provisions of Section 288 of Title 46 of the United States Code is evidently for the purpose of permitting the Collector of Customs to keep track of said vessels and for no other purpose. It clearly does not authorize a vessel to which a number is awarded to engage in trade either coastwise or foreign but is sometimes used as it is alleged was done in this case to cloak such operations. This vessel, being owned by a person who was not a citizen of the United States, was prohibited from engaging in trade under the provisions of Sections 290 and 833 of Title 46 of the United States Code, and it is apparent from the evidence in this case that the vessel was using its number to obtain ingress and egress from United

States Ports so as to avoid the penalty provided by those Sections just quoted which prohibit a foreign owned vessel from engaging in trade on an equal footing with vessels of the United States.

On this basis we respectfully submit that the evidence presented in regard to the Patricia that she was engaged in trade establishes the penalty provided by Section 4189 R. S. (Title 46, U. S. C. Sec. 60) in that said number was a record or document granted in lieu of a registery, enrollment, or license and that said number was granted solely to permit said vessel the right to leave and enter ports of the United States but that said number did not entitle the vessel to engage in trade, which it did, and that it follows as a necessary conclusion that the vessel was using said number as a cloak for its cargo carrying and as a cargo carrying vessel it was not entitled to the benefit of the number awarded it. To rule otherwise is to hold in effect that vessels owned by resident aliens claimed by their owners to be fishing boats only and assigned a number by the Collector of Customs to identify them and permit them to enter and leave ports of the United States under said number and without further inquiry or inspection is to permit said vessels to operate out of American ports in entire disregard of the laws of the United States and to give to said vessels and their owners an appreciable advantage over vessels of the United States, which are required to strictly observe in greatest detail the laws of registery, enrollment, and documentation as provided in Title 46 of the United States Code.

V.
Conclusion

For the reasons herein stated we respectfully request that this Court grant a rehearing in this matter to the end that the forfeiture sought by the United States in this case of the vessel in question may be re-presented to this Court. All of the points hereinabove made in support of this petition can be reinforced and elaborated upon, and we respectfully request permission to do so. Upon a rehearing of this matter the value of the vessel in question is not the sole issue in this forfeiture case. The vessel has been sold and the money held in the Registery of the Court to abide final decision herein. Such disposition was necessary because of the long delay involved in this matter and the deterioration of the vessel in question. Claimant at all times had an opportunity to take the vessel out upon bond but refused to do so, so that said disposition of the matter is not without fair notice to him or regard for his rights. The question of the disposition of the cargo of this vessel involves a much more substantial amount and hinges entirely upon the ruling in this case. Likewise the principles announced by this Court in its opinion must of necessity be a guide to the District Courts in this Circuit in similar cases, and we respectfully submit that the ruling as announced by this Court in this matter is a serious handicap to the Government officers in their enforcement of the customs

and shipping laws of the United States. We respectfully request, therefore, that a rehearing be granted in this matter.

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